

Why NAFTA Failed and What's Needed to Protect Workers' Health and Safety in International Trade Treaties

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Executive Summary

Labor standards, including occupational health and safety regulations and enforcement, are being subjected to intense downward pressures as a result of fundamental shifts in the global economy, commonly referred to as "economic globalization."

Manufacturing in a growing number of industrial sectors has shifted from relatively high wage, well-regulated, frequently unionized workplaces in the developed world to low wage, non-union and basically unregulated workplaces in the developing world, all of which are in intense competition with one another for investment and jobs.

The organization of production has also changed from multinational corporations owning and operating their own production facilities around the world to long, vertical supply chains of different types of producers. This chain starts with the multinational corporation which orders and sells the product, and runs through those who actually manufacture the product from contractors, to subcontractors, to brokers and agents, to industrial homework in workers' homes.

At every point in this chain, employers are under intense pressures from financial markets to produce the highest possible, short-term financial results. Employer expenditures to protect workers' health and safety are therefore minimized, despite the long term payback in product quality and reduced production costs of investing in safe workplaces.

When the North American Free Trade Agreement (NAFTA) went into effect in January 1994, its "labor side agreement," the North American Agreement on Labor Cooperation (NAALC), was hailed as the first ever formal attempt to protect labor rights in the international trade arena. The fact that the treaty united a developing country — Mexico — with two developed countries — Canada and the United States — was viewed as establishing a precedent for overcoming the inherent disparities between developed and developing countries in future trade agreements.

NAFTA and the NAALC have indeed become symbols of how to protect labor rights, including occupational health and safety, in international trade treaties — but they are symbols of a failure and a guide for what is needed to actually protect workers' health and safety in the globalizing economy.

The failure of NAFTA and the NAALC to protect workers' health and safety in North America, but particularly in Mexico, was due to the following factors:

- Inherent weaknesses of the NAALC
 - limited scope;
 - lack of parity in enforcement procedures;
 - complex, time-consuming steps;
 - lack of participation by non-governmental actors;
 - lack of transparency and openness;
 - lack of effective remedies;
 - lack of accountability;
- Political and diplomatic considerations hindered implementation;
- Failure to address the economic context and its political consequences.

There is a growing body of literature related to the terms of the post-NAFTA treaties with extensive comparisons of the terms and procedures of various treaties. No one template for all trade treaties has emerged, so there are strengths and weaknesses, from the point of view of protecting workers' health and safety, in each of the treaties currently in effect.

Picking and choosing between the treaties currently in force produces a list of concepts and provisions from the universe of approved treaties that deserve incorporation in a future, genuinely health-protective trade treaty. These aspects fall into three categories: scope; enforcement; and public participation.

Based on the experience of NAFTA/NAALC and subsequent treaties, the essential components to protect labor rights and workers' health in future trade agreements are:

- 1) A minimum floor of occupational health and safety regulations, based on conventions of the International Labor Organization, which would apply internationally;
- 2) An "upward harmonization" of regulatory standards and actual practice in workplace safety and health;
- 3) Inclusion of employers in enforcement procedures so that they have formal responsibility and liability for violations of the standards;
- 4) Effective enforcement of national regulations and international standards;
- 5) Transparency and public participation in the development and implementation of international standards and enforcement;
- 6) Recognition of disparate economic conditions among trading partners and provision of financial and technical assistance to overcome economic disincentives to effective protection of labor rights.

These key concepts and provisions should be included in the main text of the trade treaties and have the same priority, procedures and remedies as the protections afforded commerce, intellectual property and investors.

The optimal setting to protect workers' health and safety in the rapidly changing global economy would be workplaces with informed and empowered workers active in enterprise health and safety programs and committees, backed by genuine management commitment and adequate resources, in a country with comprehensive regulations meeting international standards, effectively enforced by a government with political will and sufficient human, financial and technical resources.

Such a setting does not exist anywhere in the actual global economy, but steps can be taken toward achieving this goal. NAFTA set an important precedent of incorporating labor rights, including workplace safety, into international trade agreements. It failed, as have subsequently approved treaties, to fulfill its goals because of inherent deficiencies of the agreements' scope, procedures and remedies, and the failure to recognize and address the economic and political context in which treaty provisions were to be implemented.

What is needed is a holistic approach that combines the six key elements described above in governmental trade and investment treaties with continuing activities by non-governmental organizations in a variety of arenas, including public education and advocacy, local capacity-building and professional development. Clearly, there are powerful economic disincentives and a widespread lack of political will to make protecting workers' health and safety a priority in the global economy, but the tools for creating and maintaining safe and health workplaces do exist and are just waiting to be used.

Introduction

Labor standards, including occupational health and safety regulations and enforcement, are being subjected to intense downward pressures as a result of fundamental shifts in the global economy, commonly referred to as "economic globalization."¹

Manufacturing in a growing number of industrial sectors has shifted from relatively high wage, well-regulated, frequently unionized workplaces in the developed world to low wage, non-union and basically unregulated workplaces in the developing world, all of which are in intense competition with one another for investment and jobs.

The organization of production has also changed from multinational corporations owning and operating their own production facilities around the world to long, vertical supply chains of different types of producers. This chain starts with the multinational corporation which orders and sells the product, and runs through those who actually manufacture the product from contractors, to subcontractors, to brokers and agents, to industrial homework in workers' homes.

At every point in this chain, employers are under intense pressures from financial markets to produce the highest possible, short-term financial results. Employer expenditures to protect workers' health and safety are therefore minimized, despite the long term payback in product quality and reduced production costs of investing in safe workplaces.

Governments in the developing world often are without adequate regulations and/or without the financial, technical and human resources needed to enforce whatever regulations do exist. Often these governments' enforcement efforts are undermined by extensive corruption. Many governments, dependent on foreign investment for debt payments and economic development, do not have the political will to develop or enforce labor rights protections, including workplace safety.

The growing inequality and poverty in the developing world where production facilities have moved has created a class of workers who are so desperate that they cannot refuse any work, no matter how dangerous and unhealthy. Almost all of these workers are without union protection and cannot exercise their rights on any level.

In addition, the International Labor Organization has reported that at least 43 million workers are employed in scores of "export processing zones" around the globe. In a dozen countries, workplace health regulations — along with other labor rights — are explicitly suspended and non-applicable.^{2, 3}

The protection of workers' health and safety has become difficult, if not impossible, at many points in this production chain. Effective enforcement of labor standards is also limited in non-consumer product sectors, such as the export of primary resources and intermediate products. Labor standards enforcement is essentially non-existent in "non-tradable" sectors such as subsistence agriculture and the informal sector, which are beyond the scope of this report.

When the North American Free Trade Agreement (NAFTA) went into effect in January 1994, its "labor side agreement," the North American Agreement on Labor Cooperation (NAALC), was hailed as the first ever formal attempt to protect labor rights in the international trade arena. The fact that the treaty united a developing country — Mexico — with two developed countries — Canada and the United States — was viewed as establishing a precedent for overcoming the inherent disparities between developed and developing countries in future trade agreements.

NAFTA and the NAALC have indeed become symbols of how to protect labor rights, including occupational health and safety, in international trade treaties — but they are symbols of a failure and a guide for what is needed to actually protect workers' health and safety in the globalizing economy.

Given the rapid pace of economic globalization, and the current wave of trade agreements being negotiated, "protection of labor rights" in trade and investment treaties offers an important arena and potential opportunity to improve workplace

safety and workers' health. However, the provisions, procedures and results of future trade agreements need to be very different from those of NAFTA and the other treaties now in effect for this potential to be realized.

Moreover, it is clear that besides the formal provisions and procedures of international trade treaties, there is a wide range of activities by non-governmental actors that must be continued and strengthened if workers' health and safety in the global economy is to be effectively protected.

The Failure of NAFTA and the NAALC

The tenth anniversary of NAFTA sparked a wave of articles analyzing the provisions of the NAALC and their actual results.⁴²⁹ Although far from unanimous and focusing on several distinct aspects of the agreement, the articles, nonetheless, provide a common list of factors responsible for the failure of the NAALC to effectively protect workers' health and safety in the three NAFTA countries, and particularly in Mexico.

These factors fall into three broad categories: the weaknesses of the NAALC itself; the political and diplomatic considerations limiting its implementation; and the failure to recognize and address the economic context, and political consequences of this context, in which the agreement was implemented.

Weaknesses of NAALC

First, the weaknesses of the NAALC include its limited scope, the procedures established by the side agreement, and the lack of effective remedies.

In terms of scope, the NAALC exists as a "side agreement" to the main text of NAFTA, negotiated and approved in response to widespread political opposition in the United States to the original final draft. It requires the three governments to simply enforce the regulations in existence at the time of the treaty's signing, and explicitly disqualifies complaints contending that any signatory country's regulations are inadequate or less effective than those of the other countries.

In fact, the NAALC not only does not require any "upward harmonization" of health protective regulations, it also does not prohibit the elimination or weakening of these regulations should any of the governments want to pursue a "downward harmonization."

Moreover, the NAALC addresses only a "persistent pattern of non-enforcement" by the three governments, and does not provide for any actions against employers whose workplaces are in violation of national laws and hazardous to employees working in them.

The complaint procedures established by the NAALC have several types of defects that render the side agreement ineffective.

There is a lack of "parity" in protections for the 11 "labor principles" ostensibly protected by the NAALC. There are three

"tiers of treatment" which consign violations of freedom of association and collective bargaining to the lowest level of remedies, and only violations of minimum wage, child labor and workplace safety can go through all three levels. (For a full explanation of the NAALC procedures, see the report "NAFTA's 10 Year Failure to Protect Mexican Workers' Health and Safety."⁴)

In addition to the internal disparity of protection for the 11 labor principles within the NAALC itself, labor rights violations are not accorded the same enforcement procedures as violations of the commercial provisions of NAFTA. Violations of copyright protections or "investor rights" under NAFTA have significantly more rapid and effective procedures and remedies than violations of the NAALC.

The NAALC procedures themselves consist of a long series of complex, time-consuming steps, several of which have no time limits or requirement for action by the signatory governments. Virtually all of the 18 complaints accepted for review under the NAALC provisions took years to be resolved at the second of seven steps in the NAALC process.

The NAALC procedures do not allow for participation by those submitting complaints — such as workers, unions, non-governmental organizations — beyond the first step of review by the governmental National Administrative Office (NAO) accepting the submission. Petitioners have no standing and no right to participate in any of the interactions between the governments, or the "Evaluation Committee of Experts" (ECE) and the arbitral panels established under NAALC provisions. Non-governmental actors have no direct access to redress violations of law or due process, and no way to ensure effective regulatory enforcement.

The NAALC procedures, moreover, are not transparent or open to the public. Apart from a public hearing on the initial submission — should the investigating NAO choose to have one — the rest of the NAALC procedures through all three levels (six separate steps) are closed to the public and the media. The "Ministerial Consultations" between Labor Secretaries, and any meetings of the ECEs and arbitral panels (none of which have actually been conducted to date), are all conducted behind closed doors.

The NAALC procedures also include several types of "escape clauses" which would prevent the application of any sanctions against the country not enforcing its own labor laws. These include "good faith efforts" to end the non-enforcement, the lack of resources for enforcement, and "limited" duration or pervasiveness of the non-enforcement. Also any trade sanctions can be applied only if the impact of labor law non-enforcement is "trade-related" and if the two countries involved have identical laws on the books.

Lastly, in terms of the weaknesses of the side agreement's procedures, there is a lack of accountability in the remedies established by the NAALC. There have been 28 complaints submitted under the NAALC, 18 submissions were accepted for

review by the NAO in one of the three countries, and 12 cases were resolved by Ministerial Consultations between the Labor Secretaries of the country investigating the complaint and the country charged with non-enforcement of its laws.

In all these 18 cases, none of the organizations and individuals who submitted the complaints were consulted about the resolution of their petition, and, in fact, several submitters were never even informed of the “Ministerial Agreement” which terminated their complaint. In no case has there been any post-resolution evaluation of whether the ministerial agreement terminating the complaint actually addressed or affected the cause of the non-enforcement of the labor laws.

In one case, the Duro Bag complaint filed with the U.S. NAO in 2001, the NAO dismissed the submission without a hearing stating that since there is no Mexican law requiring secret ballot elections for union representation, no case of non-enforcement by Mexico existed. The Mexican government, however, had committed to requiring secret ballot elections as part of the Ministerial Agreement terminating two previous NAALC petitions filed in 1997.⁵

Moreover, no employer whose violation of the national laws was the basis of the NAALC complaints has been required to end its non-compliance, or to compensate in any way the workers whose rights and health were compromised by the employer action.

Political and Diplomatic Considerations

The second broad category of failure of the NAALC related to the political and diplomatic considerations that have affected its implementation.

The NAALC procedures are ultimately not a factual adjudication of a dispute, but rather an inter-governmental negotiation of policy. In the 12 cases that were resolved by Ministerial Consultations, the governments involved negotiated with one another over periods of months and years to achieve a politically acceptable resolution of a proven case of non-enforcement of the law.

The complaint resolution activities to date have consisted of reports, seminars, conferences, websites and outreach sessions, almost exclusively involving government functionaries. There have been no substantial changes in procedures, policies or benchmarks in government enforcement arising from the resolution of NAALC cases.

Under the NAALC, any of the three government’s NAOs can, on their own authority, initiate investigations related to persistent failure to enforce labor laws in one of the other NAFTA countries. But for political and diplomatic reasons, no such investigations have been conducted. Instead all the NAALC complaints have been initiated by workers and non-governmental organizations, and the systemic problems brought to light by the complaints have not been subsequently pursued by the NAOs.

Political considerations have prevented the NAALC process from proceeding beyond the second of seven steps — Ministerial Consultations — in any of the 28 submissions. In fact, the three NAFTA governments effectively abandoned the NAALC process with the failure to establish an ECE for the Auto Trim/Custom Trim (AT/CT) case.

Despite numerous requests by the petitioners in the AT/CT case to convene an ECE to evaluate the non-enforcement of workplace safety regulations in Mexico, the governments instead formed in 2002 a “Tri-National Working Group of Government Experts,” a body that does not appear anywhere in the NAALC text or procedures. The Working Group was reportedly formed because the Mexican government was opposed to an ECE, which consists of non-governmental experts, passing judgment on Mexican government operations.¹⁰

Economic and Political Context

Thirdly, the NAALC failed because it failed to recognize and address the economic context, and political consequences flowing from this context, in which Mexico exists.

Mexico, like many other developing countries, is heavily indebted to international financial institutions and private banks. In 2003, Mexico’s foreign debt totaled almost \$160 billion dollars and the country paid out \$11.2 billion in interest payments alone.³⁰

Foreign Direct Investment (FDI) is essential to Mexico to pay the interest, let alone the principle, of these accumulated debts. In 2003, Mexico paid out \$11.2 billion in interest payments, while attracting only a \$10.8 billion in FDI, which has been in decline since 2001. In the first three and a half years of the Vicente Fox administration in Mexico, the country made \$52.8 billion in debt interest payments while receiving \$51.68 billion in foreign direct investment.^{31, 32}

The World Bank’s “Global Development Finance 2004” report indicates that Mexico’s total external debt represents 75% of its total exports and 24% of the Gross National Income.³⁰ In the period of January-June 2004, Mexico paid out \$8.38 billion in interest payments on this debt, more than the \$7.88 billion it received from remittances from Mexican workers in the U.S., the \$6.0 billion it earned in oil exports, and the \$5.56 billion it gained in tourism revenue.³¹⁻³³

Any governmental policy that “discourages foreign investment” — such as active enforcement of occupational or environmental health regulations — is economic suicide and a political impossibility for Mexico. As a result there is no political will to enforce Mexico’s workplace safety regulations, and there are very limited financial and human resources for regulatory enforcement, should the economic disincentives to enforcement be overcome.

Neither NAFTA nor the NAALC was accompanied by any policy for debt relief or forgiveness; moratoriums or elimination

of debt payments; or economic aid that could mitigate the overwhelming disincentives for regulatory enforcement. Nor were there any policies under NAFTA establishing technical and financial assistance, technology transfers or professional development for effective enforcement of regulations in Mexico.

The technical assistance provided by Federal OSHA in the United States to its counterpart in Mexico (STPS) as part of the post-2002 Working Group has been limited in scope and scale, and cannot begin to overcome the overwhelming lack of political will and scarcity of resources needed for effective regulatory enforcement in Mexico.

In summary, the failure of NAFTA and the NAALC to protect workers' health and safety in North America, but particularly in Mexico, was due to the following factors:

- Inherent weaknesses of the NAALC
 - limited scope;
 - lack of parity in enforcement procedures;
 - complex, time-consuming steps;
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Subsequent Trade Treaties

The Clinton Administration, which negotiated the NAALC and won approval of NAFTA and its labor and environmental side agreements, was unable to gain renewal of the "fast track" trade treaty approval procedures in Congress (an up or down vote without any amendments) during the rest of its term. The only other trade agreement signed during the Clinton years was the U.S.-Cambodia treaty in 1998.

In the administration of George W. Bush, however, U.S. trade treaties have been signed with Australia, Cambodia, Chile, Jordan, Morocco, Singapore, and a proposed draft of a Central American Free Trade Agreement (CAFTA) has been issued. Several dozen other bilateral and regional trade treaties are currently under negotiation, including the Free Trade Area of the Americas (FTAA) and the Andean Free Trade Agreement. The Bush Administration won approval of a three-year "fast track" treaty approval process in the 2002 Trade Promotion Act.

There is a growing body of literature related to the terms of the post-NAFTA treaties with extensive comparisons of the terms and procedures of various treaties.^{5, 34-53} No one template for all trade treaties has emerged, so there are strengths and weaknesses, from the point of view of protecting workers' health and safety, in each of the treaties currently in effect.

Picking and choosing between the treaties currently in force produces a list of concepts and provisions from the universe of approved treaties that deserve incorporation in a future, genuinely health-protective trade treaty. These aspects fall into three categories: scope; enforcement; and public participation.

First, in terms of a broad scope of labor rights protections, including workplace safety, there are positive aspects in NAFTA, the U.S.-Jordan and U.S.-Cambodia treaties.

NAFTA established the concept that effective enforcement of domestic labor law is an international obligation. The agreement's 11 labor principles are the appropriate range of labor rights that need protection in the global economy.

The U.S.-Jordan treaty incorporated the labor rights section into the main text of the agreement, as have other post-NAFTA agreements, rather than as a secondary "side agreement." The text requires signatories to "strive to ensure" that "internationally recognized labor rights" (the ILO core conventions) are "recognized and protected by domestic law." The Jordanian agreement explicitly recognizes that it is "inappropriate to encourage trade by relaxing domestic labor laws."⁵

The U.S.-Cambodia agreement established the framework for the concept of "upward harmonization" of standards and enforcement by increasing Cambodia's export quotas of garments to the U.S. based on "substantial compliance" with internationally recognized labor rights as verified by ILO auditors monitoring factories in Cambodia.

Second, the enforcement procedures of the Jordan treaty establish parity of enforcement, both within the range of labor rights and between labor rights and commercial provisions of the trade agreement. This means that there is a single set of dispute resolution procedures and remedies for violations of both commerce-related and labor rights-related provisions.

Third, NAFTA remains the trade agreement with the greatest scope of public participation, albeit with greatly restricted transparency and openness. The NAALC complaint process through which workers and the public can bring complaints about the violation of labor rights and the lack of labor law enforcement has not been duplicated in subsequent treaties. The specific NAFTA enforcement procedures are not desirable, but the right of workers and the public to file complaints is key.

In framing future trade treaties, these selected, positive aspects of the current treaties should be retained and strengthened.

Essential Components for Future Trade Treaties

Although some "free trade absolutists" oppose inclusion of any and all non-commercial aspects in international trade and investment treaties, how best to protect labor rights (including occupational safety and health) in international agreements has been the subject of numerous articles, reports and books.^{5, 6, 34, 35, 38, 39, 54-68}

In fact, labor rights protections have been part of the discourse regarding trade for more than 50 years. The preamble to the 1947 General Agreement on Tariffs and Trade (GATT) recognized trade “not as an end in itself, but rather as a means for raising standards of living.”⁶¹ Article 6 of the 2001 Doha Declaration of the World Trade Organization (WTO) stated: “we recognize that under WTO rules, no country should be prevented from taking measures for the protection of human, animal or plant life, of health, or the environment.”⁶¹ WTO trade negotiators in Doha also stated that trade agreements should not adversely affect indigenous peoples and gender equality. The 2002 U.S. Trade Promotion Act declared that one of the negotiating objectives of the United States Trade Representative is to “promote respect for workers rights.”³⁴

Based on the experience of NAFTA/NAALC and subsequent treaties, the essential components to protect labor rights and workers’ health in future trade agreements are:

- 1) A minimum floor of occupational health and safety regulations, based on conventions of the International Labor Organization, which would apply internationally;
- 2) An “upward harmonization” of regulatory standards and actual practice in workplace safety and health;
- 3) Inclusion of employers in enforcement procedures so that they have formal responsibility and liability for violations of the standards;
- 4) Effective enforcement of national regulations and international standards;
- 5) Transparency and public participation in the development and implementation of international standards and enforcement;
- 6) Recognition of disparate economic conditions among trading partners and provision of financial and technical assistance to overcome economic disincentives to effective protection of labor rights.

These key concepts and provisions should be included in the main text of the trade treaties and have the same priority, procedures and remedies as the protections afforded commerce, intellectual property and investors.

Table 1: Key Policy Documents of the International Labor Organization
<ul style="list-style-type: none"> ▪ ILO Declaration on Fundamental Principles and Rights At Work (1998) <ul style="list-style-type: none"> - Freedom of association: Conventions 87 and 98 - Abolition of forced labor: Conventions 29 and 105 - Equality/Non-discrimination: Conventions 100 and 111 - Elimination of child labor: Conventions 138 and 182 ▪ Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (1997, amended 2000) <p style="text-align: center;">The texts of the documents are available at: www.ilo.org</p>

1. Minimum Floor of International Regulations

The first order of business in protecting workers’ health and safety in the global economy is establishing a floor or minimum set of international standards for workplaces anywhere in the world.

Simple reliance on enforcement of national laws will result in non-uniform and unequal sets of regulations (especially between developing and developed countries), it rewards countries with low standards, and it perversely gives incentives to weaken existing laws. Moreover, the experience of even a wealthy country with numerous regulations like the United States shows that reliance on domestic laws does not itself guarantee uniform and effective enforcement.⁶³

The logical source for minimal international standards are the conventions of the International Labor Organization (see Tables 1 and 2). The ILO is an 85-year-old tripartite organiza-

Table 2: ILO Occupational Safety & Health and Labor Inspection Conventions
<ul style="list-style-type: none"> ▪ Convention 13 (1921): White Lead (Painting) — 62 ratifications ▪ Convention 45 (1935): Underground Work (Women) — 84 ratifications ▪ Convention 81 (1947): Labor Inspection — 128 ratifications ▪ Protocol of 1995 to Convention 81 — 10 ratifications ▪ Convention 115 (1960): Radiation Protection — 47 ratifications ▪ Convention 119 (1963): Guarding of Machinery* — 49 ratifications ▪ Convention 120 (1964): Hygiene in Commerce and Offices — 49 ratifications ▪ Convention 127 (1967): Maximum Weight* -- 25 ratifications ▪ Convention 129 (1969): Agriculture Labor Inspection — 40 ratifications ▪ Conventions 136 (1971): Benzene* -- 36 ratifications ▪ Convention 139 (1974): Occupational Cancer — 35 ratifications ▪ Convention 148 (1977): Working Environment (Air Pollution, Noise and Vibration) — 41 ratifications ▪ Convention 155 (1981): Occupational Safety and Health — 38 ratifications ▪ Protocol of 2002 to Convention 155 — 0 ratifications ▪ Convention 161 (1985): Occupational Health Services — 21 ratifications ▪ Convention 162 (1986): Asbestos — 26 ratifications ▪ Convention 167 (1988): Safety and Health in Construction — 16 ratifications ▪ Convention 170 (1990): Chemicals — 10 ratifications ▪ Convention 174 (1993): Prevention of Major Accidents — 7 ratifications ▪ Convention 176 (1995): Safety and Health in Mines — 18 ratifications ▪ Convention 184 (2001): Safety and Health in Agriculture — 2 ratifications <p>* = designated as an out-of-date convention to be revised.</p> <p>There are 175 member countries of the ILO.</p> <p style="text-align: center;">The texts of the documents are available at: www.ilo.org</p>

tion of government, employer and worker representatives that has developed its policy statements, conventions, recommendations and guidelines through a consensus process of the three key sectors.

Of course, the ILO and its activities are not without critics, and there are doubts about the content and enforceability of the ILO conventions.^{2, 3, 59, 69-76} Nonetheless, the ILO is the best starting point for constructing an international floor of standards and actual practices, starting with key standards and then including additional conventions, recommendations and guidelines over time.

The ILO labor rights eight core conventions, the “Fundamental Principles and Rights at Work,” do not actually include any of the ILO’s 19 Conventions, one Protocol and 23 Recommendations that address occupational health and safety (OHS). But a key aspect of the Fundamental Principles is that they are binding to all 175 member countries of the ILO regardless of whether the country has specifically ratified all core conventions or not.

A long term goal must be the formal incorporation of key OHS conventions into the ILO’s Fundamental Principles — but an

important beginning would be trade treaty provisions incorporating ILO Conventions 155 (Occupational Safety and Health) and 161 (Occupational Health Services) into the “internationally recognized labor rights” required by the treaties themselves.

In addition, Recommendation 194 (List of Occupational Diseases) should be another key plank, and the OHS concepts and provisions of the ILO Declaration of Principles Concerning Multinational Enterprises (approved in 1997 and amended in 200), should also become parts of the international standards floor.

As part of the process of constructing and raising the international floor of OHS standards, more planks can be added over time from the ILO conventions, recommendations and guidelines (see Tables 2, 3 and 4). There is a wealth of other international guidelines, codes of conduct, and technical consensus standards (see Table 5) that can be drawn upon over time to become part of the international floor of OHS standards and practices.

International trade treaties can and should require signatory countries to develop and enact a plan to ensure that their national laws meet the “internationally recognized labor standards” (including OHS) within a reasonable, established time period, such as two to three years.

There are established precedents for nations changing their national laws and regulatory enforcement procedures are

**Table 3:
ILO Codes of Practice Used As
National Guidance Documents**

- Guidelines on occupational safety and health management (2001) — 13 countries
- Prevention of major industrial accidents (1991) — 10 countries
- Safety in the use of chemicals at work (1993) — 9 countries
- Recording and notification of occupational accidents and diseases (1995) — 9 countries
- Safety and health in construction (1992) — 8 countries
- HIV/AIDS and the world of work (2001) — 6 countries
- Management of alcohol- and drug-related issues in the workplace (1996) — 4 countries
- Safety and health in forestry work (1998) — 3 countries
- Ambient factors in the workplace (2001) — 3 countries
- Occupational exposure to airborne substances harmful to health (1980) — 2 countries
- Safety in the use of asbestos (1984) — 2 countries
- Safety and health in coal mines (1986) — 2 countries
- Safety and health in open cast mines (1991) — 2 countries
- Technical and ethical guidelines for workers’ health surveillance (1992) — 2 countries
- Protection of workers’ personal data (1997) — 1 country
- Use of synthetic vitreous fiber insulation wools (2000) — 1 country
- Safety and health in the non-ferrous metal industries (2001) — 1 country
- International Chemical Safety Cards (ICSC) published in 16 languages by the ILO covering 1,300 chemical substances.

Source: “ILO standards-related activities in the area of occupational safety and health; An in-depth study for discussion with a view to the elaboration of a plan of action for such activities”, Report VI, Annex II, Table 3; 91st Session; 2003.

**Table 4:
ILO Recommendations Designated "Up-to-date"**

- Labor Inspection Recommendation No. 81 (1947)
- Mining and Transportation Labor Inspection Recommendation No. 82 (1947)
- Protection of Workers’ Health Recommendation No. 97 (1953)
- Welfare Facilities Recommendation No. 102 (1956)
- Radiation Protection Recommendation No. 114 (1960)
- Workers’ Housing Recommendation No. 115 (1961)
- Commerce and Office Hygiene Recommendation No. 120 (1964)
- Agriculture Labor Inspection Recommendation No. 133 (1969)
- Occupational Cancer Recommendation No. 147 (1974)
- Working Environment (Air Pollution, Noise and Vibration) Recommendation No. 156 (1977)
- Occupational Safety and Health Recommendation No. 164 (1981)
- Occupational Health Services Recommendation No. 171 (1985)
- Asbestos Recommendation No. 172 (1986)
- Safety and health in Construction Recommendation No. 175 (1988)
- Chemicals Recommendation No. 177 (1990)
- Prevention of Major Industrial Accidents Recommendation No. 181 (1995)
- Safety and Health in Agriculture Recommendation No. 192 (2001)
- List of Occupational Diseases Recommendation No. 194 (2002)

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required to meet trade agreement objectives. Examples of this include domestic adoption of stricter intellectual property protections under the WTO, or changes in national laws to protect investors in Chile and Singapore under their bilateral treaties with the United States.^{6, 36}

2. Upward Harmonization

The underlying approach to establishing an international floor for labor and OHS standards is a strict requirement for all countries to uphold the core conventions combined with a progressive realization, or “upward harmonization,” of standards over time at a pace consistent with the specific socioeconomic standards of each country, and with financial and technical assistance from countries with more resources and experience.

All of these “international standards” — ILO conventions, recommendation, declarations and guidelines as well as other consensus and technical standards — must, over time, become

adopted as part of national laws and enforced as any other national regulation. International standards that are not “grounded” as part of national regulatory systems are unlikely to make any difference on the factory floor.

There are several examples of such a process. The ILO conventions themselves require universal application of the key principles, while providing a broad scope of national diversity in implementation.³⁸ In 1994 during the Uruguay Round of the GATT negotiations a “Technical Barriers to Trade” agreement was signed with calls for national standards to meet the substance of international standards, and for a open, transparent standards setting process.⁷² Treaties such as the “International Covenant on Economic, Social and Cultural Rights” and its “Protocol of San Salvador” allow for a step-wise approach where treaty provisions are implemented over time.^{34, 36}

The European Union is currently undertaking a large effort to standardize various OHS regulations, such as machine guarding, ergonomics and personal protective equipment, between its now 25 member nations. The EU is also transforming CEN standards to worldwide International Standards Organization (ISO) standards as part of the “European New Approach.”^{59, 72, 99}

The U.S.-Cambodia trade agreement established an initial 6% annual increase in the export quota of Cambodian garments to the U.S. coupled with an additional quota increase up to 18% if “substantial compliance” with national law and international labor standards, as verified by ILO monitors, was achieved.^{36, 70, 77}

3. Employer Responsibility and Liability

The third key component of OHS-protective trade treaties are provisions which hold employers and investors accountable for violations of labor standards wherever their products are made.

There should be a right of private action in domestic courts to provide remedies for workers who have suffered actual harm, and to hold companies violating national law and international standards accountable for their actions. The Alien Tort Claims Act in the United States is one example of how injured workers can redress violations of international labor standards.^{54, 78}

Another critical component is prohibition of “investors’ rights” clauses such as Chapter 11 of NAFTA which allows corporations to sue national governments to overturn domestic labor rights or environmental laws that the corporations consider “barriers to trade” and which create “lost profits” for the private business if they are obliged to obey the laws.^{79, 100}

4. Effective Enforcement

International labor rights and OHS standards are meaningless if they are not effectively enforced. Protection of workers’ health and safety in a global economy requires a global and comprehensive strategy, summarized by one analyst as a “com-

**Table 5:
Selected International Codes and Guidelines
Which Include Occupational Health and Safety**

- OECD Declaration and Decisions on International Investment and Multinational Enterprises — Organization for Economic Cooperation and Development
 - includes "Guidelines for Multinational Enterprises"
 - Text available at www.oecd.org
- Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises With Regard to Human Rights — United Nations Sub-Commission on the Promotion and Protection of Human Rights (August 13, 2003)
 - text available at www.unhchr.ch
- Corporate Codes of Conduct
 - Information on numerous corporations’ codes available at www.business-humanrights.org
- Third Party Monitors of Corporate Codes of Conduct
 - Fair Labor Association at www.fairlabor.org
 - Social Accounting International at www.sa-intl.org
 - Workers Rights Consortium at www.workersrights.org
- Non-Governmental Organization Codes and Guidelines
 - Amnesty International at www.amnesty.org
 - Clean Clothes Campaign (Europe) at www.cleanclothes.org
 - Ethical Trading Initiative (UK) at www.ethicaltrade.org
- United Nations Globally Harmonized System for the Classification and Labeling of Chemicals (GHS)
 - Information available at www.unece.org/trans/danger/publi/ghs/officialtext.html
- Industry and Technical Consensus Standards
 - American Conference of Governmental Industrial Hygienists — Threshold Limit Values (TLVs) (US)
 - American National Standards Institute (US)
 - American Society for the Testing of Materials (US)
 - European Committee for Standardization (CEN)
 - International Standards Organization (ISO)
 - National Electrical Code (US)
 - National Fire Protection Association (US)
 - National Institute for Occupational Safety and Health (US)

bination of carrots, sticks and sunshine.”³⁸ Effective enforcement in trade treaties requires texts with the right words on the page, real plans of action by governments with adequate resources and the necessary political will, provision of financial and technical assistance where needed, and involvement of all actors to ensure actual implementation.

Supranational dispute resolution and effective remedies to achieve trade objectives, including protection of labor rights, is already a reality in several arenas. The United States government has suspended trade benefits to at least 10 nations under the General System of Preferences, and then restored the benefits when progress was achieved in complying with national and international standards.^{45, 61, 62} This includes a 1996 suspension of benefits for Pakistan’s sporting goods, medical instruments and carpet industries due to child labor violations.³⁴ The U.S. government itself has been subject to the WTO dispute resolution process and has made changes in national law and policy in compliance with the WTO rulings.⁶

Effective protection of workers’ health in future trade treaties depends on several factors.

First, the treaties must include labor rights provisions, including OHS, in the main text of the agreements and have a single set of enforcement procedures and remedies for all violations of the agreement — commercial and labor provisions alike.

Second, future agreements must have two institutional elements that the NAALC and NAFTA did not — an independent monitoring agency and a permanent, impartial tribunal to adjudicate disputes, both with adequate human and financial resources. There have been several alternative means proposed to carry out these institutional functions.

Some analysts have suggested expanding the activities of the ILO itself, based on the experience of the U.S.-Cambodia trade agreement and complaints filed under Articles 24 and 26 of the ILO Constitution and the enforcement power of Article 33. The ILO’s Cambodia activities have included factory monitoring, public reports, facilitating a national arbitration council, and playing a mediating role in dispute resolution.^{2, 39, 56, 57, 63, 70}

Others have suggested that the constitution of the WTO be amended to include a “social clause” setting forth protected rights including that of safe and healthful workplaces, and/or that Article XX be amended to permit trade sanctions on items produced under conditions violating labor rights beyond just forced labor, and/or that Article VI prohibiting “social dumping” be amended to protect labor rights.^{56, 61}

It must be noted, however, that the WTO procedures explicitly rule out actions based on Process and Production Methods (PPM) and on national violations of social norms. Unless there are significant changes in the ideology and constitution of the WTO, which has already overruled the state of Massachusetts’ attempt to impose trade sanctions over forced labor in Burma,

it is unlikely the WTO will be a useful means of protection labor rights.

Others still have proposed creation of an “independent, non-political oversight body with the authority to levy penalties to ensure compliance,” and with the power to initiate as well as investigate complaints.³⁴ Examples of this type of body include the ILO’s Committee of Experts on the Application of Covenants and Recommendations and the Inter-American Commission on Human Rights of the Organization of America States.

Each of these models has weaknesses. The ILO does not currently have the capacity and resources to conduct Cambodia-style monitoring in other countries. Enforcement under Article 33 has been initiated only once in the organization’s entire history (2000 in Burma) and resolution of that action is still pending. Enforcement under Articles 24 and 26 are only possible when the offending country has actually ratified the convention in question. The WTO dispute resolution process is completely secretive and the very antithesis of a transparent, open and participatory procedure. A completely new international enforcement organization would take time and significant resources to create and maintain.

Nevertheless, effective enforcement will be possible only with independent, permanent investigating and adjudicating institutions with sufficient resources and political will to ensure across-the-board compliance with international standards.

Regardless of the final form these institutions may take, it is clear that the ILO can and should play a larger role internationally, assuming it receives adequate resources to do so, providing key expertise and the legitimacy of a tripartite organization.

Among the tasks an expanded ILO could undertake are: broader promotion of OHS standards among legislators and regulators, employers, workers and consumers; wider dissemination of OHS research and “best practices;” increased direct technical assistance; facilitating greater inter-agency cooperation on a national and international level; and building strategic alliances between governments, employers and worker organizations, on one hand, and civil society groups concerned about women, migrant workers and the environment, on the other.^{2, 56, 63, 74}

Third, future trade treaties must find the appropriate and effective penalties for violators of international labor and OHS standards. Currently there is a debate about whether trade sanctions or fines against governments and employers are more effective in securing compliance, or whether some combination of these would be optimal.

Some analysts have noted that trade sanctions are so draconian that they are almost never levied, and if they are never applied, they are ineffective. Also trade sanctions can adversely affect the intended beneficiaries, the workers, by causing unemployment and economic insecurity.^{5, 63} Others have suggested,

however, that “targeted” sanctions aimed at the industrial sector or employers responsible for the violations of labor rights have been and will be effective.^{34, 43, 47}

Proponents of substantial fines against governments failing to enforce laws and protect health — in lieu of trade sanctions — believe that fines can be used to increase scrutiny of non-compliance, to direct governments to hire, train and equip inspectors, and to obtain the technologies needed to enforce compliance.³⁴ Critics have suggested that fines will simply result in adjustments within national budgets to “rob Peter to pay Paul” without any net increase in health standards enforcement.

In addition, re-routing or even increasing funding to corrupt or inefficient agencies which failed to perform adequately in the first place provides no guarantee of better results in the future. These analysts suggest funds from fines on governments, or non-compliant employers, should be directed to training and technical assistance by outside organizations like the ILO.^{57, 70}

Any penalty system must be carefully crafted to achieve two goals: 1) to discourage or punish deliberate non-compliance, often caused by lack of political will; and 2) redirect or generate resources to address non-compliance caused by lack of adequate resources.

And lastly, effective enforcement in future treaties will require periodic reviews with specific benchmarks for national performance in meeting international standards for protecting workers’ health and safety.

Annual reviews should evaluate the existing national laws’ coverage of labor rights, the progress made toward upgrading domestic laws to international standards, and the actual level of compliance with national law and international standards. These reviews could be conducted by industrial sector, and should involve organizations like the ILO or independent standards monitors.^{34, 35}

One set of “sunshine” proposals include development of a public labor standards compliance index similar to Transparency International’s “perception of corruption index.” The labor standards index would cover broad categories like NAFTA’s 11 labor principles, provide a “trend indicator” of the dynamic compliance process, and indicate whether non-compliance is due to lack of political will or to a lack of resources and assistance.^{70, 80}

No single, “perfect” template for standards enforcement internationally has yet been developed, and there are alternative routes to reaching the same goals. As William Gould, former chairman of the National Labor Relations Board in the United States, has noted “the fact that some matters are difficult to resolve does not argue against international regulation.”⁶³

The key principles for an effective enforcement system are universal and uniform procedures and remedies within the text of the agreements; establishment of long term, adequately financed monitoring and tribunal institutions; an effective sys-

tem of meaningful penalties; and a periodic comprehensive reviews of performance benchmarks on a national level.

5. Transparency and Public Participation

One of the major weaknesses of the NAALC and the current WTO dispute resolution processes is the secrecy and exclusion of public participation. Given the intense economic pressures working against labor rights in the global economy, participation and countervailing pressure from civil society are critical to effectively protecting workers’ health and safety. “Civil society” actors would include employers, employees, unions, consumers, community-based and non-governmental organizations.

Transparency and public participation should occur in all phases of the development of trade treaties: negotiations, approval, implementation and evaluation.^{6, 36, 38, 39, 40, 48, 54, 61}

Negotiating agendas, country proposals, draft texts should be made public at regular intervals. Public hearings, consultations between negotiators and civil society, and referendum may also be useful and necessary parts of the negotiating and approval process.

There should be a public, multinational complaint process to accept petitions from all affected parties, to investigate charges, and to remedy confirmed violations of labor rights protections in the treaties. In particular, the complaint process must be accessible to workers through such mechanisms as telephone hotlines, mail-in report forms, union representatives, and complaints via community-based and non-governmental organizations.

Relevant documents and information related to reported violations should be made public, and the deliberations of any dispute resolution body should be open and public. There must be a formalized process to verify remediation of confirmed labor law and OHS violations. The labor law protections section of trade agreements must include regularly scheduled reviews of national implementation of treaty commitments, soliciting and evaluating comments from all interested parties.

For example, the U.S.-Cambodia agreement has produced such reviews in 1999 and 2000, and the ILO monitors have issued periodic public reports on factory working conditions as well. The Generalized System of Preferences in the U.S. has also generated annual performance reviews for countries where labor law violations have been confirmed.³⁶

One of the first actions needed to implement labor law protections in trade treaties is an “initial national assessment” of each signatory country’s existing labor laws and OHS regulations to determine their coverage in relation to internationally recognized labor standards, and to identify areas requiring technical and financial assistance, and capacity-building to achieve upward harmonization. There may be a need for special programs targeting specific industrial sectors (e.g., garment, export processing zones) and vulnerable populations (e.g., migrant workers, child labor).

Moreover, meaningful public participation in labor rights protections will require educational campaigns about labor rights and OHS protections for both employers and workers by national governments and organizations like the ILO.⁷⁴

6. Overcoming Economic Disincentives and Providing Assistance

Formal legal protections of labor rights or workers' health are meaningless where the necessary resources for enforcement are not available and when economic disincentives undermine the political will needed to enforce the law. Effective OHS and labor rights protections in trade treaties are only possible when the economic context of the countries involved, and its political consequences, are recognized and addressed.^{2, 38, 39, 40, 41, 44, 48, 61, 70, 74}

As described above in the case of Mexico, many developing countries are heavily indebted to international finance institutions or private lenders, and are dependent on foreign direct investment to pay the interest and principal of these loans. Any policy that "discourages foreign investment" — such as the promulgation and enforcement of environmental and occupational health regulations — is not economically and politically viable.

These economic disincentives underlie the lack of political will in many countries to enforce existing and to upgrade health protective regulations. No amount of technical assistance will be able to overcome this lack of will unless the causes of it are recognized and addressed.

Therefore, as an occupational health and safety issue, debt relief measures such as moratoriums on payments and/or outright debt forgiveness must be considered and implemented.

Once the economic disincentives are reduced or eliminated, then capacity issues and related assistance can be effectively organized. Trade treaty labor rights provisions must be accompanied by financial and technical assistance to be effective. The goal of this assistance should be further develop, rather than substitute for, national capacities to promulgate and enforce health protection regulations and standards.

Sources of financial assistance could include donor governments, multilateral lending institutions, and innovative initiatives such as the "Tobin Tax" on international currency transactions. Several examples of this kind of assistance already exist, including child labor programs in Pakistan and Bangladesh.^{63, 70}

As part of the U.S.-Cambodia garment trade agreement, the monitoring of labor conditions in Cambodia by ILO inspectors was accompanied by a parallel \$500,000 program for training and technical assistance to the Cambodian Labor Ministry. The U.S. government covered \$1.4 million of the total costs of monitoring with the local government and employers' association contributing the balance.⁷⁰

The U.S. government also allocated \$140 million under the 2003 "Trade Capacity Building Assistance" bill for education in the Western Hemisphere about workers' rights under national and international laws as well as corporate codes of conduct. This program sets a useful precedent, even though there have been criticisms that the funding levels are both inadequate and not optimally allocated.^{38, 39, 44}

The Asian Development Bank has launched a "Social Protection Strategy" promoting respect for the ILO core standards in Asia. Other financial institutions, such as the International Finance Corporation, Inter-American Development Bank and European Bank for Reconstruction and Development, are considering similar initiatives.² Again the precedent and example are more important than any weaknesses of the ADB program.

There are other examples of international cooperation on labor rights issues that could be used in crafting initiatives to promote and protect workers' health and safety. The International Programme on the Elimination of Child Labour (IPEC), which involves the World Bank, Inter-Parliamentary Union, UNICEF, UNESCO and the United Nations Millennium Development Goals, is one such initiative.² Another example is the International Programme for the Improvement of Working Conditions and the Environment (PIACT) established by the ILO and World Health Organization in 1976.⁷⁴

The "Tobin Tax" is a proposal for a 0.025% tax on international currency transactions that would produce an estimated \$250 billion annually for use in social development programs.⁸¹ Some of those funds, if the proposal were to be adopted, could be used for capacity-building programs with employer, worker, non-governmental organizations and government agencies in the developing world.

Another aspect of effectively protecting workers' health is a systematic campaign to fight corruption in the enforcement of existing and future regulations and standards. Financial and technical assistance to governments will not have a positive impact if inspection and enforcement systems are undermined by extensive corruption.

Essential Non-Governmental Activities

Even assuming that trade treaties with all of the essential components described above were approved by trading partners in the global economy, effective protection of workers' health and safety will still require action by non-governmental actors — primarily the workers themselves and civil society.

No workplace health and safety program can be fully effective without the active participation of informed and empowered workers. Trained and informed workers must be an active part of workplace health and safety programs conducting hazard inspections and evaluations, accident investigations, and employee training. This is particularly true in the skyrocketing

number of giant factories in Asia and the Americas where thousands of workers in a single facility produce consumer goods for the global economy.

Without the protection of a union and the ability to collectively bargain for contracts including health and safety provisions, individual workers cannot play an meaningful role in creating and maintaining safe and healthful workplaces.

For this reason, the ILO's freedom of association conventions (Numbers 87 and 98) must be considered essential workplace safety and health measures as well. At the same time that occupational health professionals push for inclusion of the key ILO health and safety conventions (Numbers 155 and 161) into the ILO's core labor rights conventions, promotion and implementation of Conventions 87 and 98 should be advocated, in turn, by OHS professionals.

Civil society in both the developed and developing worlds has an important role to play as well. In the last decade, non-governmental organizations have brought to world-wide attention the issue of unsafe and unhealthy working conditions in factories in the developing world producing consumer goods for transnational corporations.⁸²⁻⁹¹

Campaigns against hazardous working conditions have included public education, cross-border solidarity campaigns, consumer boycotts, shareholder resolutions, and lawsuits. Numerous multinational corporations have subsequently adopted corporate codes of conduct, including standards for workplace health and safety, and additional codes have been developed and promoted by non-governmental organizations, and by organizations monitoring corporate compliance with their own codes (see Table 5).⁹²⁻⁹⁵

The lawsuits to date have been based on U.S. trade legislation, including the General System of Preferences, Section 301 of the Trade Act, and the 1790 Alien Tort Claims Act.^{78, 88} Other legal actions may be possible under the 1997 Trade and Tariff Act, and the regulations of the Caribbean Basin Initiative and the Overseas Private Investment Corporation (OPIC).^{42, 62, 88}

Occupational safety and health professionals have also come together in efforts to promote the development of adequate regulations, effective enforcement, and national professional associations. Organizations like the International Occupational

Hygiene Association, International Association of Labour Inspection, and the Maquiladora Health and Safety Support Network have worked to build local capacity of both government agencies and civil society organizations in the area of occupational health and safety.⁹⁶⁻⁹⁸

All these non-governmental efforts must continue as the trade treaties are negotiated and implemented. The economic and political pressures working against effective protections of workplace health and safety in the global economy are so strong that only a "perfect storm" of concerted action by governmental, non-governmental, employer and worker actors will overcome them.

Conclusion

The optimal setting to protect workers' health and safety in the rapidly changing global economy would be workplaces with informed and empowered workers active in enterprise health and safety programs and committees, backed by genuine management commitment and adequate resources, in a country with comprehensive regulations meeting international standards, effectively enforced by a government with political will and sufficient human, financial and technical resources.

Such a setting does not exist anywhere in the actual global economy, but steps can be taken toward achieving this goal. NAFTA set an important precedent of incorporating labor rights, including workplace safety, into international trade agreements. It failed, as have subsequently approved treaties, to fulfill its goals because of inherent deficiencies of the agreements' scope, procedures and remedies, and the failure to recognize and address the economic and political context in which treaty provisions were to be implemented.

What is needed is a holistic approach that combines the six key elements described above in governmental trade and investment treaties with continuing activities by non-governmental organizations in a variety of arenas, including public education and advocacy, local capacity-building and professional development. Clearly, there are powerful economic disincentives and a widespread lack of political will to make protecting workers' health and safety a priority in the global economy, but the tools for creating and maintaining safe and health workplaces do exist and are just waiting to be used.

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